IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 212

FRED BARNETT AND EDNA M. BARNETT,
Petitioners,

vs.

RECONSTRUCTION FINANCE CORPORATION,
A CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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MAY IT PLEASE THE COURT:

We beg leave to submit this brief in reply to Respondent's brief in opposition to our petition for certiorari, for the reason that several inaccuracies and misstatements are contained in its answer brief. And to the end that we may help remove any possible confusion on the issues presented we thus ask the privilege to present these comments.

SUMMARY STATEMENT.

Under the several headings of Opinion Below, Jurisdiction, Questions Presented, Statutes Involved, and Statement, respondent has made a substantially correct recital of the facts and issues as we have presented them, with the exception that under its Questions Presented (p. 2), the first part of question one stating: "Whether under state law the contract is void", we assert such is not involved in this record. The validity or non-validity of the contract (the note and mortgage) is not a vital point, excepting as made so in the opinion of the circuit court below, and which we say went beyond and outside the issues raised on the appeal before that court.

The actual question for determination in connection with this point is whether a judgment of foreclosure on these securities can be rendered and enforced in any court, state or federal, not necessarily because of their validity or invalidity, but because a legal defense in bar has been interposed which would defeat a recovery either on a valid or void contract.

As to the second part of this question one, we say if these securities are not enforceable in the state court, then no recovery thereon can be obtained in the federal court.

The second question, the law of the case, is present; also its third question,—on the effect of the two voluntary dismissals.

ARGUMENT.

Respondent says we complain of the misinterpretation placed upon the Indiana decisions construing this foreign corporation act in the Circuit Court opinion below. We frankly say that neither this opinion nor that in the Kane case, as its authority, is well founded, because they follow the Stone Co. case (*Peter & Burghard Stone Co.* v. *Carper* (1930), 96 Ind. App. 554), and the Selph case (*Selph* v. *Ill. Pipe Line Co.* (1934), 206 Ind. 490), both of which were decided prior to the date of the opinion in the Barnett-Central Republic appeal.

Apparently opposing counsel ignore the fact that these two cases involved corporations still alive and functioning as such, both of which subsequently complied with the act, whereby the legal disability to operate in the state was removed. The present case questions the right of a holder of securities obtained from a corporation, since dissolved and non-existent, to enforce recovery thereon, where such corporation illegally operated in the state by its failure to comply, and by reason of its dissolution, rendering compliance impossible. The Indiana decisions mark a clear distinction in the two situations. Counsel have failed to meet this issue. The Stone Co. case, their leading authority, clearly points out this very distinction. We quote from it (96 Ind. App. 554, at p. 599):

> "The correct rule appears to be stated in *Swing* v. *Toner* (1912), 178 Ind. 102, 96 N. E. 946, where the court, quoting from 1 Chitty, Pleading (16th Am. Ed.) Sec. 462, said: 'Whenever the subject-matter of the plea or defense is that the plaintiff cannot maintain any action at any time whether present or future in respect of the supposed cause of action, it may, and usually must be pleaded in bar; but matter which merely defeats the present proceeding, and does not

show that the plaintiff is forever concluded, should in general be pleaded in abatement.'

If the contract is void, or where the foreign corporation has failed to comply with the statute, and by reason of insolvency, or otherwise, it has reached a state which prevents a compliance with the statute, the facts, with reference to its non-compliance and condition, may be pleaded in bar. (*Lowenmyer* v. *National Lumber Co.* (1919), 71 Ind. App. 458, 125 N. E. 67; *Wiestling* v. *Warthin, supra.*)''

It will be observed that the Swing case is given as authority in the foregoing. Therefore, respondent is rather inconsistent when it says this case should not be considered because it has before it a different foreign corporation act.*

Let us recall that in the Burroughs case (*Burroughs* v. *So. Colonization Co.* (1928), 96 Ind. App. 93, and the Lowenmyer case (*Lowenmyer* v. *Natl. Lumber Co.* (1919), 71 Ind. App. 458), the court had before it this same section as here involved. Further, the Burroughs opinion refers to the Stone Co. decision and makes no criticism of it. Then, the Stone Co. decision was rendered nearly five years prior to the date of the Barnett case opinion (*Barnett* v. *Central Republic Bank & Trust Co.* (1935), 100 Ind. App. 495), by the same court, which lapse of time afforded counsel for appellee in the latter case ample opportunity to cite it and rely upon it, but they did not do so.

Now, a discussion on a few of respondent's authorities. Reference is made to the Lupton case (*Lupton's Sons, David,* v. *Auto Club of America* (1912), 225 U. S. 489) as authority for the right to recover in the federal court. This involved the foreign corporation act of New York, which had as its only penalty a provision denying the offender

* Chapter 43, Acts 1877, p. 65, provides (Sec. 1) that it shall not be lawful for any agent of any insurance company incorporated by any other state—directly or indirectly, to take risks or transact any business of insurance in this State, without first producing a certificate of authority from the Auditor of State. A further requirement compels the company, among several other things, to authorize service of legal process upon the agent on its behalf.

access to the state courts. But since this decision is long prior to that in the Erie case, and in conflict with the latter, it is no longer an authority.

In *Elston* v. *Piggott* (1883), 94 Ind. 14, a prior action was filed in the federal court to foreclose a mortgage. The defendants therein did not plead the failure of the plaintiff corporation to register as a foreign corporation. In the second action, as cited, the court held the decree in the former action was final and not subject to a collateral attack on the ground of non-compliance. The case is not in point.

Daly v. *The National Life Ins. Co. of the United States of America* (1878), 64 Ind. 1, is not in point. No cross-complaint to quiet title was filed in that action. However, the defendant filed abatement to plaintiff's action for its failure to obtain a foreign corporation license. The trial court sustained plaintiff's demurrer to this plea. The Supreme Court held this an error and reversed the trial court.

In opposition to our contention that the Barnett-Central Republic decision is the law of the case, respondent says the Indiana court did not discuss the effect of the 1907 Corporation Act outside the courts of the state, or even the validity of the note and mortgage. Why should it? It is absurd to even suggest that our state court could control jurisdiction outside its own state. Anything it would say in that regard would be pure dicta. As to the validity of the securities, the appellee there made no assertion in this regard, and the court was not required to try that question.

In the Swing case the court was urged to commit itself on the question of validity, but it refused to do so, saying that such was not necessary; and that the fact of the failure to comply with the Act, coupled with the corporation's subsequent dissolution, thereby rendering compliance impossible, when interposed by a plea in bar to the action was sufficient. Nothing more is required.

We are confident the court will hold that it was the duty of the Circuit Court below to follow the doctrine laid down in the Erie case, which requires the federal court to follow and apply the State statutes and decisions. Among the several subsequent decisions of this court to the same effect is that of *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.* (1941), ... U. S. ....., 85 L. ed. 631), which came up from the same circuit, and was there decided about two weeks subsequent to the decision in the present case. And the Circuit Court followed the wrong line of decisions of the Iowa courts on the question of the elements necessary to constitute fraud, etc. with reference to the sale of securities. This court reversed for such error. We have the same circumstance at bar in that respondent is here urging the wrong line of authorities on this question. The Wichita case (*Wichita Royalty Co.* v. *City Nat'l Bank* (1939) 306 U. S. 103), and the Stoner case (*Stoner* v. *N. Y. Life Ins. Co.* (1940), ... U. S. ....., 85 L. ed. 275) are substantially identical with the present case, and which we have discussed in our main brief. We rely upon them.

Conclusion.

We therefore assert respondent has not set forth a valid reason why the writ herein prayed for should not be granted. All the authorities it presents deal with the rights of a corporation still in existence, and where they did comply with the law. None are cited wherein the corporation has been dissolved, whereby future compliance is impossible. Respondent does not even contend that the contract of a non-existent corporation, in the hands of its successor or assignee can be enforced, excepting by virtue that the contract when made was not void, and which we show is not the controlling factor. The non-compliance is the bar to the prosecution of the action, and which remains so long as the non-compliance exists. It is the compliance that allows the prosecution, and without this prerequisite being

performed, the holder of the contract has no right to enforcement. Why was the Stone Co. allowed to prosecute its action? Not by reason of the validity of its contract, but solely by virtue of the fact that it registered as a foreign corporation, thus allowing it access to the State Court, and taking away the right of the defendant to file a plea in abatement by reason of non-compliance.

And the matters in issue were definitely and completely settled and determined by the Appellate Court of Indiana in the Barnett case decision. The original owner of these same securities voluntarily submitted itself and its cause to the jurisdiction of the State trial court, where it obtained a judgment in its favor. And it was so well satisfied with the validity of such judgment that seven days later its successor, as a substituted plaintiff, voluntarily dismissed another action against the same parties on the same securities it had seven months previously filed in the United States District Court below. Then following this reversal by the Appellate Court, the plaintiff apparently reasoned it could nullify the effect of this decision by dismissing its case in the State trial court. We stand on our assertion that this decision is the law of the case.

And again we pray that the court grant the writ of certiorari.

Respectfully submitted,

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August, 1941.